IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

THE TERRITORY OF NEW MEXICO,
APPELLANT,

v.

UNITED STATES TRUST COMPANY OF NEW YORK AND C. W. SMITH,
APPELLEES.

No. 182.

BRIEF OF APPELLEES.

Statement.

For a statement of the facts in this case, appellees refer to the statement of facts contained in their brief filed in case No. 181.

Points and Authorities.

FIRST.

I.

The action of the collector of Valencia county, on June 7, 1897, in listing upon the tax list of 1896 the property in

controversy, and levying taxes against it, constituted no notice to the owners of the property, and placed upon them no requirement of appealing to the Board of County Commissioners, until they were notified of the action by the collector. (See tax laws of New Mexico in appendix to brief of appellants in 181, and in appendix to this brief.)

The court will remember that, at the time of this action, a deed had been executed to the purchasers, under the judicial sale made on the 3d day of May 1897, of the property involved. The court will also remember that, at the confirmation of the sale of this property on May 4th, the solicitor for the Territory appeared before the court for the purpose of having certain provisions entered in the decree of confirmation. The client of the learned solicitor then acquired full and complete knowledge of the fact that the property had been sold to Messrs. Walker, Morawetz and Hays, and that by the decree of confirmation the purchasers had become invested with the full equitable title, with a right to a deed conveying the full legal title upon demand. With this knowledge the learned solicitor, in directing the collector as to whom notices of the assessment should be sent, omitted the names of the actual owners (Tr. p. 282). By the knowledge acquired by the agent of the county, it was at least put upon enquiry as to whether the deed was executed or not.

If the assessment in controversy had been made upon the assessment roll, or upon the tax list, for 1897, the owners of the property would doubtless have been required to take notice of the fact; but having been made upon the tax list of the previous year, there was, and is, nothing in the scheme of taxation provided by the revenue laws of New Mexico which required the purchasers of the property assessed to take notice of this action. The collector either purposely or otherwise omitted to give any date of these

assessments on the tax rolls of 1896, showing the date of making these assessments, in order, we assume, that it might appear that they had been made in 1896, and that the taxes were delinquent on January 1, 1897, more than five months previous to their assessment. Without notice of this action there was no duty on the part of the owners of the property to appeal from the assessments made prior to the time the intervening petition was filed.

II.

The County Board of Equalization had no power or jurisdiction to determine what part of this property that was assessed by the collector was exempt or not exempt. The determination of the collector upon this question was only *prima facie* correct. No appeal could have been taken to the Board of County Commissioners from such determination. The court will remember that when the collector acts the appeal from his action is to the County Board and not to the Board of Equalization; but even if an appeal did lie from his action to the Board of Equalization, such board would have had no jurisdiction over the subject-matter of determining how many miles of the right of way of the railroad in controversy was acquired by the railroad company over land held in private ownership. This entire question is very fully and forcibly discussed by the Supreme Court of Oregon in the case of Portland University *v.* Multnomah County (31 Or. 498), under statutes concerning the powers of Boards of Equalization like the one under consideration.

III.

Appellant asserts in its brief that because of the fact that the receiver and the United States Trust Company, in the pleas originally filed to the intervening petition, admitted

that there were fifty-eight miles of the right of way, through land acquired from private individuals, such admissions constituted an estoppel, although no judicial action was taken upon such admission; no one misled by it, and the pleas containing the admission were subsequently withdrawn.

It is hard to conceive upon what principle this doctrine of estoppel is urged. Certainly the decisions of this court, cited on page 6 of the brief, do not lend any support to the position of appellant. This admission in the pleas was, at most, mere surplusage, as the pleas could not put in issue any fact in the intervening petition. These pleas were set down for argument, but before any argument was heard upon them they were withdrawn. If an argument had been had upon them every fact contained in the intervening petition would have been admitted as true for the purposes of the pleas.

United States *v.* California, etc., Land Co., 148 U. S. 40.

Under the correct practice, as determined by this court, any admission in these pleas could not be used for any purpose by either party, except upon the hearing of the pleas, either upon argument or upon issue joined.

Farley *v.* Kittson, 120 U. S. 303.

United States *v.* California, etc., Land Co., *supra*.

IV.

It will be seen, by reference to that part of the agreed statement of facts concerning this matter appearing on page 284 of the transcript, that the admission made in the pleas was made without any knowledge on the part of the solicitors making the same with reference to the actual facts in the case, and, as no one was deceived or misled by this admission, it cannot seriously be contended that such admission amounts to an estoppel.

SECOND.

I.

The Territory was not entitled to recover any interest upon the taxes alleged to have been levied.

The interest fixed by the statute quoted was and is in the nature of a penalty.

Litchfield *v.* County of Webster, 101 U. S. 779.

Cooley on Taxation (2d ed.), pp. 456–7.

II.

It could not possibly attach in any event until the taxes themselves were levied. While the property was being administered in the hands of the court as an insolvent property, interest could not be allowed or collected on account of the failure to pay any taxes.

Thomas *v.* Western Car Co., 149 U. S. 95.

Grand Trunk Ry. Co. *v.* Central Vermont Ry. Co., 90 Fed. 163.

Same case, 91 Fed. 570.

III.

The tax collector in making the assessments in controversy, placed the same on the tax list in a lump sum, and extended against such lump sum the taxes assessed by him. (See Exhibit 6, Tr. pp. 183–185; Exhibit 8, pp. 190–192; Exhibit 10, pp. 196–199; Exhibit 12, pp. 201–205; Exhibit 14, pp. 208–211.) The gross assessment upon the tax list included property confessedly exempt, even though there was property included in it not exempt. The taxes being

levied in each year upon a gross assessed value of exempt and non-exempt property were on their face illegal.

People *v.* C. P. R.R. Co., 127 U. S. 1.

County of Santa Clara *v.* C. P. R.R. Co., 118 U. S. 394.

The owners of the property were obviously not required to pay the total taxes levied against this gross assessment. There could be no default on the part of such owners until the tax list had been corrected, so as to show the amount of taxes due upon the property that was taxable. If it were admitted that the owners of the property should have looked to the typewritten pages attached to the tax list to find out at what sum the property not exempt from taxation was assessed, and then figure up the taxes and tender the same, such admission would not change the result. The assessment of the improvements upon sixty miles of the right of way as non-exempt, included, according to the judgment of the two courts below, nearly five miles of exempt property, or a valuation of some $33,000 not assessable or taxable. Therefore, the assessment and the levy made were each, in any view of the case, illegal, and hence no interest could be charged for a failure to pay such illegal taxes until the actual amount of the valid tax was in some way ascertained. Until the amount of legal taxes was definitely ascertained, the owners of this property had no opportunity of paying such taxes, and were therefore not in default in not paying, hence the claim for back interest is not a valid one. See, as directly in point, the following cases:

L. S. & M. R. Co. *v.* People, 46 Mich. 193–211.

County of Redwood *v.* Winona, etc., Land Co., 40 Minn. 573.

IV.

Sections 10 and 34, of the session laws of New Mexico of 1899, quoted in appellant's brief, at pages 8 and 9 and 11 and 12, show that the legislature repealed the law authorizing this interest, and extended the time to pay these taxes until the end of the litigation, which was pending at the time of the passage of the act. The extension of the time for the payment destroyed any penalty imposed for non-payment. This act having taken effect and been in force prior to the enactment of the further act in 1899, quoted on pages 12 and 13 of appellant's brief, rendered such further act inoperative.

State *v.* Mayor, etc., Jersey City, 37 N. J. L. 39.
Snell *v.* Campbell Co., 24 Fed. 880.
Andering *v.* Levy, 57 Miss. 52, 57, 58.

In this connection we call attention to that portion of the opinion of the Supreme Court of New Mexico, which was rendered in this case, construing these statutes, on pages 329 to 331 of the transcript.

THIRD.

I.

It is pretty difficult to discover upon what theory the learned counsel for appellant claims a right to a penalty of twenty-five per cent. (25%) for failure to make returns, as set forth on page 14 of the brief.

In the first place, there is no allegation in the intervening petition covering any such penalty, and the intervening petition does not ask for any such recovery. In the second place, the statute quoted by the learned counsel, on page 14 of the brief, only imposes such penalty when there is a failure to render a list of property subject to taxation by the tax payer, *upon a demand made upon him for such list*, under the provisions of section 2822. (See appendix to brief of appellants in case No. 181, page 157.) There has been no suggestion, either by pleading, agreed statement of facts, or otherwise, that any demand was ever made upon any one by the assessor of Valencia county to list the property attempted to be assessed by the collector. While it is admitted in the agreed statement of facts that no return of this property was made by the railroad company after the year 1892, such admission falls far short of showing any default upon its part, as it could only be in default upon a demand made upon it by the assessor.

II.

The statute fixing the penalty requires such penalty to be assessed and collected as a part of the taxes. There was no penalty assessed, according to any statement in the intervening petition. In fact, the statute authorizing the

assessment of omitted property does not provide for the assessment of penalties or interest, but simply for the assessment of arrearages of taxes.

In conclusion, we desire to call the attention of the court to the fact that until the adoption by the legislature of New Mexico of section 25, chapter 22, of the laws of 1899 (which imposes no penalty for its breach) there was no duty imposed upon a tax payer to either return his property for assessment in the absence of a demand made upon him by the assessor, or to see that his property was upon the assessment or tax rolls. We call attention to sections 4035, 4036 and 4040, of the Compiled Laws of New Mexico of 1897, which were in force at that time, and shown in the appendix hereto, together with section 25, chapter 22, of the laws of 1899.

All of which is respectfully submitted.

C. N. STERRY,
Solicitor for Appellees.

E. D. KENNA,
ROBERT DUNLAP,
Of Counsel.

APPENDIX.

Sections 4035, 4036, and 4040 of the Compiled Laws of New Mexico of 1897.

Sec. 4035. If any person, liable to taxation, shall fail to render a true list of his property, as required by the preceding three sections, the assessor small make out a list of the property of such person, and its value, according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to the penalty of twenty-five per cent. thereof, which shall be assessed and collected as a part of the taxes of such person.

Sec. 4036. If any person liable to taxation shall knowingly make a false list of his property subject to taxation in this territory, for the purpose of avoiding any proper assessments of taxes, he shall be liable to a penalty of twenty-five per cent., to be added to the amount of the taxes assessed upon the true amount and value of his property, and shall also be deemed guilty of perjury.

Sec. 4040. If the owner or claimant of any property, not listed by another person, is absent or unknown, the assessor must make an estimate of the value of such property, and if the name of the absent owner is known to the assessor, the property must be assessed in his name; if unknown, the property must be assessed to, Unknown owners.

Section 25, Chapter 22, of the Laws of New Mexico of 1899, Page 59.

Sec. 25. It is hereby made the duty of every person, firm, or corporation, owning or having any interest, legal or equitable, in any real estate or other property, in this territory, on the first day of March of any year, to see that such property is properly listed for taxation on the assessment roll for such year in the county in which the same is situated; and if such property is described in the assessment roll and delinquent tax list for any year by such de-

scription as will serve to identify (identify) the same, the sale of such property for taxes as provided in this act shall not be void or set aside on account of any error or irregularity in listing the same upon such roll or list either as to the name or names of the owner or owners thereof, or by reason of its being listed in the name of the wrong person; and no bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes, penalties, interest, and costs, had been paid before the sale, or that the property was not subject to taxation. In case any tract or legal subdivision of real estate, be sold as hereinabove provided, upon a part of which the taxes had been paid, such sale and certificate shall nevertheless vest a complete and perfect title in the purchaser and his assigns to such portion of said tract or subdivision upon which the taxes had not been paid.